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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementation of Section 302 of The Telecommunications Act of 1996	)	CS Docket No. 96-46
OPEN VIDEO SYSTEMS	)	

COMMENTS
OF MFS COMMUNICATIONS COMPANY, INC.

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SUMMARY

MFS welcomes Congress' efforts to encourage the development of competition from local telephone companies in the distribution of multi-channel video programming. MFS agrees with the Commission that its goal should now be to adopt regulations that will promote the Congressional intent to provide for "flexible market entry, enhanced competition, streamlined regulation, diversity of programming choices, investment in infrastructure and technology, and increased consumer choice." Flexible regulations and reliance on market-based controls against anti-competitive behavior are essential if the Commission's rules are to further these goals. The law has now relieved the Commission from many of the statutory constraints which existed when it developed its video dialtone ("VDT") rules and which hamstrung the Commission's ability to implement a fully market-driven approach to that service. As a result, most of the VDT proposals that the Commission had attempted to nurture were stillborn. The Congress has now given the Commission the tools to develop rules which will indeed allow telephone companies the flexibility to design and implement OVS platforms which are economically justified by demand, technology, and network constraints.

Just as Congress indicated a very strong desire that OVS not simply be a reconstituted VDT structure when it terminated the Commission's VDT rules, MFS stresses that the Commission must not assume that OVS platforms will necessarily develop in the configuration envisioned when VDT proposals were developed pursuant to more restrictive statutory and regulatory constraints. The 1996 Act has made possible a whole new class of local exchange carriers who will now be authorized to compete head-to-head with incumbent LECs. Those new

carriers have very different networks, technology and capital structures than their incumbent competitors. Consequently, in order for the Commission to achieve the robust facilities-based competition which the Congress expects in the local marketplace, the Commission's rules must be flexible enough to allow the survival of demand-driven OVS systems as well as systems based on currently available, finite and ubiquitous infrastructure available only to incumbent LECs. Newer telephone companies such as MFS cannot possibly incur the tremendous capital expense required to duplicate the infrastructure available to an incumbent LEC on the hope that "if they build it, programmer's will come." Instead, these companies must be allowed to construct additional infrastructure as demand warrants.

With respect to specific issues on which the Commission has sought comment, MFS offers the following suggestions:

- **The Competitive Marketplace Should Control Rates, Terms and Conditions**

MFS urges the Commission to rely on market forces to ensure that reasonable rates, terms and conditions are negotiated between the parties. The Commission will retain complaint jurisdiction in order to resolve disputes if the arise, but in the meantime, the Congress has very clearly signaled its intent that market forces be relied upon to assure just and reasonable rates. Moreover, the Commission is correct in observing that OVS operators (and particularly those new local exchange market entrants like MFS) will by definition compete with established cable operators whose penetration among cable subscribers is now 100 percent. Based upon its similar experience in opening up the long distance marketplace to competition, the Commission can be

confident that the 1996 Act's reliance on the market is well-justified. In that earlier experience, the Commission wisely did not impose standards and formulas, or require carriers to publish rates, and a robustly competitive market is the result. There, both facilities-based and resale carriers compete vigorously, and a myriad of new services and pricing structures have developed. There is no reason to second guess Congress' belief that the same market-based approach will succeed here as well.

- **OVS Operator Certificates of Compliance Should be Approved if Facially Proper**

The 1996 Act requires that carriers submit a Certificate of Compliance to the Commission in order to qualify for streamlined regulation and requires the Commission to approve or reject such certifications within 10 days. What the Congress envisioned by the Commission was a "certification of the carrier's intent to comply" with the rules -- it certainly did not intend that the Commission give a "stamp of approval" to the OVS operator. Instead, the Congress provided for minimal entry hurdles, with complaint jurisdiction if the Commission or any other entity later believes that the OVS operator is not in compliance with its obligations. (In this regard, MFS cautions that, as in the long distance context, the Commission must be "mindful of the potential for the frivolous or strategic use of the complaint process," and be prepared to take strong action if and when any such frivolous complaint is filed.)

- **OVS Operators Should not be Required to Carry the Program of Competing Cable Franchisees**

The Commission should permit OVS operators the flexibility to deny carriage to competing cable operators and their programming affiliates. To require such carriage would run counter to the intent of Congress to introduce additional facilities-based competition into the video market. It would also be a recipe for anti-competitive mischief, insofar as it would permit a cable operator to tie up capacity on its competitor's network without any reciprocal obligations, would give the cable operator access to confidential business plans and information, and would provide a vehicle for the cable operator to tie up its competitor in regulatory proceedings with frivolous challenges and proceedings.

- **The Commission Should Not Prejudge Any Particular OVS Network Configuration or Service Design**

The Commission's challenge in developing its OVS rules will be to allow carriers the "broad flexibility" envisioned by Congress to develop OVS networks and services which justify investment in "transmission infrastructure and technology." Most difficult, but clearly workable, will be the development of rules which provide that, where "demand" exceeds "capacity," OVS operators and their affiliates may not use more than one-third of the system's channels. This is clearly a critical issue. The possibility that, at any point in time bandwidth might have to be re-allocated and existing customers thereby deprived of programming to which they had subscribed, would eliminate any incentive whatsoever for a carrier to initiate OVS service.

As a threshold matter, it is impossibly uneconomic for a carrier to construct substantial excess capacity for which it does not, and may never, have demand. In order to avoid such excess capacity, and to satisfy the 1996 Act's one-third/two thirds obligation, therefore, "capacity" should include both existing capacity and capacity that the operator can construct or otherwise obtain by reconfiguring or re-engineering the network within a reasonable amount of time. (In this regard, it is also essential that the Commission provide that the OVS operator can assure that "demand" is *bona fide* before any such effort is required.)

Similarly, the Commission's notice requirements should require that the OVS operator provide notice in its Certificate of Compliance as to the markets where it will offer service, and permit 45 days for any interested programmer to submit a *bona fide* request, whereupon the OVS operator can develop appropriate pricing and capacity engineering for its initial system. After that initial subscription by programmers, the Commission should establish that additional enrollment periods of up to 3 years may be provided for by the OVS operator to accommodate additional demand. Should *bona fide* demand exceed capacity at those times, the OVS operator should be permitted to maintain compliance with the capacity requirements of the statute either by re-allocating existing capacity, re-engineering its system, or by constructing new capacity within six months.

- **The Manner In Which Programming Obligations Will Be Met Should Be Left To Negotiations Between The OVS Operator, Programmers, And Where Appropriate, Local Franchising Authorities**

The manner in which programming obligations can most effectively and appropriately be met will depend to some extent on the OVS network configuration and the type of service offered by programmers. The Commission's involvement should be limited to requiring the parties to comply and then allowing them to ascertain the most effective means to do so.

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COMMENTS
OF MFS COMMUNICATIONS COMPANY, INC.

MFS Communications Company, Inc. ("MFS"), pursuant to the Commission's Report and Order and Notice of Proposed Rulemaking ("*NPRM*" or "*Notice*")[1/] in the above-referenced proceeding, hereby submits its Comments and Proposed Regulations regarding Open Video Systems ("OVS"). MFS strongly supports the efforts of Congress to facilitate the development of competition in the video marketplace by, among other things, creating the Open Video System, an entirely new framework for providing video services to the marketplace. MFS urges the Commission to follow through on its stated effort to implement this new framework in a way that

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1/ *In re Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems* and *In re Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58*, Report and Order and Notice of Proposed Rulemaking, CC Docket No. 87-266 (Terminated) and CS Docket No. 96-46, FCC 96-99 (released Mar. 11, 1996).

"will promote Congress' goals of flexible market entry, enhanced competition, streamlined regulation, diversity of programming choices, investment in infrastructure and technology, and increased consumer choice."[2/]

To do so, Congress has freed the Commission from many of the statutory constraints formerly imposed on its ability to develop fully a truly marketplace-driven regulatory structure for the common carrier "video dialtone" ("VDT") services offered by local telephone companies. Indeed, by actually terminating the Commission's video dialtone rules (as opposed to permitting the Commission to modify them), the Congress has dramatically signaled its intent that OVS not simply be implemented as reconstituted VDT service. Instead, the Congress has given the Commission wide latitude to develop flexible rules which do not envision any single configuration or any single type of provider, but instead will allow both incumbent and new local exchange carriers to respond to the marketplace by developing innovative, cost-effective video distribution platforms "tailor[ed] . . . to meet the unique competitive and consumer needs of individual markets."[3/] Indeed, the Congress has even given the Commission the flexibility to forbear from enforcing the provisions of the 1996 Act as to any service, carrier or class of carriers if it determines that enforcement is not necessary.[4/] As the Commission has long recognized, and Congress has now confirmed in its repeal

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[2/] *NPRM* at ¶ 4.

[3/] *Id.* at ¶ 2 (citing Telecommunications Act of 1996 Conference Report, S. Rep. 104-230 at 177 (Feb. 1, 1996) ("Conference Report")).

[4/] The Telecommunications Act of 1996 (the "1996 Act"), Section 401. With the exception of certain incumbent local exchange carrier interconnection obligations (§ 251(c)) and provisions regarding Bell operating company entry into interLATA services (§ 271), Section 401 of the Act provides that the Commission

(continued...)

of unnecessary regulatory burdens and its adoption of pro-competitive policies and options throughout all segments of the telecommunications industry, "vigorously competitive markets, not regulation, are the best way to serve consumers' interests."[5]

I. INTRODUCTION AND STATEMENT OF INTEREST

MFS is a publicly-traded telecommunications corporation, organized under the laws of the State of Delaware. MFS, one of the pioneers in the development of competition in the local marketplace, has been providing competitive local telephone services for eight years. MFS' subsidiary, MFS Telecom, Inc., has invested over a billion dollars in the development, construction and operation of state-of-the-art fiber optic communications networks in 43 metropolitan areas across the U.S. and, in response to end users and carriers who are highly receptive to competitive service offerings, offers an ever-expanding range of high-quality digital local access, private line,

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[4] (...continued)
shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that --

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest.

(emphasis added).

[5] *Id.* at ¶ 2.

and switched local services. MFS looks forward to even greater growth in the wake of the 1996 Act, as federal and state regulators eliminate historic restrictions on the entry of local service competitors and the unnecessary regulatory burdens which hamper innovation and vigorous competition.

MFS has a substantial interest in this rulemaking proceeding. As possibly the only non-dominant local exchange carrier which has developed and tariffed a common carrier video distribution system pursuant to the Commission's VDT rules, MFS is in a unique position to comment upon the need for the Commission to establish rules which encourage such non-dominant carriers to participate and which will clearly permit all local exchange carriers ("LECs") sufficient flexibility to develop transmission systems which do not simply match a single one-size-fits-all platform concept but instead respond to market demands. If there is a central theme to the provisions of the 1996 Act, it is that Congress intended to assure that regulation not serve to impair the development of competition, and that new entrants into both the telephone and video marketplaces be afforded the opportunity to add to such competition by receiving at least the same opportunities as the incumbent providers. While there is nothing in the *Notice* to suggest that the Commission does not intend for non-dominant local exchange carriers to participate fully in the video marketplace, including the development of OVS networks, neither is the *Notice* explicit that the Commission *does* envision (and indeed seeks to encourage) such participation. A statement from the Commission that it does seek to promote development of OVS by *all* local exchange carriers is essential to the ability of non-dominant carriers such as MFS to raise the significant capital necessary to do so, and to its ability to move forward with internal planning and resource allocation. MFS urges that the Commission's order include such a policy statement.

II. THE COMMISSION'S RULES MUST PERMIT CARRIERS TO DESIGN SYSTEMS THAT ARE COMPATIBLE TO THEIR OWN NETWORK IN RESPONSE TO MARKET DEMAND

In requesting that the Commission's rules provide all local exchange carriers ("LECs") sufficient flexibility to develop OVS networks tailored to their own network designs and market demand, MFS recognizes that the Commission has a responsibility under the 1996 Act to assure that such platforms conform to the principles and requirements set forth by Congress. The Commission also has a responsibility not to stifle innovative approaches through its regulation, however, or to pre-determine the nature of the OVS platforms that creative, highly competitive carriers may develop in the future.

For example, MFS' business plan includes the continued expansion and development of OVS over its existing fiber optic transmission infrastructure and over the additional facilities which it intends to construct as demand increases. Without ubiquitous networks, however, it is impossible for MFS to predict how and where it will develop future OVS systems, since by definition the competitive market envisioned by Congress has barely begun to develop. MFS' primary concern in this proceeding is therefore to urge that the Commission implement the OVS provisions of the 1996 Act in a way that will allow all local exchange carriers, and particularly new local competitors such as MFS, sufficient flexibility to develop demand-driven new products and services that are compatible with their networks, and that therefore sustain infrastructure and technology investment. MFS submits that it is precisely this type of flexibility that the Congress envisioned in developing a broad statutory framework for OVS and by precluding extensive entry scrutiny of every OVS system. Instead, the Congress provided that OVS operators be required only to submit Certificates

of Compliance to enter the market, with any subsequent questions of compliance to be considered on a case-by-case basis in light of an individual operator's circumstances.[6/]

In its *Notice*, the Commission generally acknowledges and indeed, appears to favor, a flexible regulatory approach which would permit MFS and other carriers to develop such demand-driven systems. Some of the possible alternative approaches raised in the *Notice*, however, are framed from the perspective of its extensive experience with the VDT systems which were proposed by incumbent local exchange carriers. If adopted, these would severely constrict the ways in which OVS could develop.[7/] In their VDT proposals, the incumbent local telephone companies not surprisingly envisioned system designs which could only make economic sense in the context of existing ubiquitous telephone networks (if, indeed, the history of VDT supports even that assumption).[8/] As a new competitor without such a network, however, MFS cannot justify

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[6/] 1996 Act §§ 653(a), 653(b).

[7/] Simply put, it is as if a government agency were to design automotive safety rules based on an assumption that, because all cars designed to date have rear wheel drive, its rules should only pertain to that design. In so doing, however, the presence of such rules would serve as a barrier to development of front wheel drive or four wheel drive vehicles. Clearly, neither the Commission nor the Congress would intend such a result, and it is precisely to avoid such a regulatory straight-jacket that the Congress gave the Commission clear direction to minimize regulation and, indeed, the extraordinary authority to eliminate it altogether if appropriate.

[8/] Given the history of VDT, MFS submits that the VDT systems initially envisioned by incumbent LECs may have been too costly and speculative, even for carriers of their market strength and with their existing network infrastructure. It is not surprising, given this experience, that Congress wiped the slate clean and established a far more flexible pro-competitive and deregulatory approach for OVS.

economically the investment in a "field of dreams." It simply cannot build out a video distribution network on the basis that, "if it builds it, programmers will come."[9/]

There is no reason to suggest that Congress intended for OVS to provide only one type of platform for carriers to transmit video programming, and therefore effectively to limit video distribution infrastructure development only to the incumbent dominant local telephone and cable television carriers. The Commission must therefore assure that its implementing rules do not inadvertently preordain such a duopoly result. Moreover, MFS notes that such a result would also have an irreparably harmful spillover effect beyond merely the video distribution marketplace. Inevitably, the detrimental effect of limiting competition to a duopoly structure would also infect competition in the local telephone marketplace, since only the two incumbent carriers could effectively offer both telephone and video services over their networks. As a result, other carriers would necessarily have significantly fewer efficient uses for their telephone network infrastructure and therefore would not be able to justify as much new construction or to raise the necessary

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[9/] Despite the fact that the VDT rules were clearly designed with the systems proposed by incumbent local exchange carriers in mind, MFS was persuaded that the market justified its construction of a common carrier video platform consistent with the Commission's rules. It therefore developed such a system and has initiated such service on a limited basis in Boston. While some of the Commission's rules were sufficiently flexible for MFS to design its platform based on its high-capacity fiber optic network infrastructure, others led to inefficiencies. For example, one of the aspects of the VDT rules that MFS had to contend with in developing its Boston system was the requirement that it construct, and reserve in perpetuity, substantial excess capacity beyond the only identified demand from the outset. Specifically, MFS constructed twice as much capacity as had been demanded by a programmer without any indication that the excess would ever be utilized. Requiring such an inefficient use of capital resources made market entry far riskier than necessary. This is the type of unnecessary regulatory impediment which Congress sought to eliminate by replacing VDT with OVS rules. Without the freedom to put the infrastructure "cart" behind the "horse" of demand for OVS, no entity (other than an incumbent LEC or other entity with ubiquitous infrastructure) will be able to enter the OVS market.

financing to do so. In addition, they would be substantially disadvantaged in marketing their services in competition with the incumbent telephone and cable providers who will now be marketing a full range of telephone and video services. This asymmetric competition would not be likely to lead to the technological advancements and price reductions that Congress intended to encourage, and is certainly one reason why the Congress reserved for the Commission the ability to forbear from regulation with respect to certain classes of telecommunications carriers.[10/] Therefore, any regulations adopted pursuant to the *Notice* must be drafted in broad enough terms that they implement the statutory OVS obligations but do not limit OVS configurations in such a way as to eviscerate Congress' goal of encouraging competitive entry and spurring new investment. As the *Notice* recognizes, the best way to achieve this goal is to rely upon market forces to regulate OVS whenever possible.

III. THE COMMISSION APPROPRIATELY PROPOSES TO RELY ON MARKET FORCES TO ENSURE REASONABLE AND NON-DISCRIMINATORY RATES, TERMS AND CONDITIONS

Many of the regulations proposed and issues raised by the Commission in the *NPRM* are designed to implement the statutory requirement that the Commission's rules must prohibit OVS operators from discriminating among video programmers with respect to carriage over the OVS network, and must require them to establish just and reasonable rates, terms and conditions of carriage which are not unjustly or unreasonably discriminatory.[11/] The Commission has requested

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[10/] 1996 Act § 401; *see* note 4, *supra*.

[11/] *NPRM* at ¶¶ 29-34; *see also* 47 U.S.C. § 573(b)(1)(A) (1996 Act at § 653(b)(1)(A)).

comments on how to implement this mandate, particularly in light of the 1996 Act provisions that OVS operators will not be regulated as common carriers, and that the Commission will only have 10 days to review Certificates of Compliance submitted by OVS operators.[12/]

The *Notice* tentatively concludes that "there may be a number of viable options that would be consistent with the provisions of the 1996 Act concerning nondiscrimination and reasonableness of rates"[13/] The Commission is correct that OVS operator flexibility to establish service offerings and pricing mechanisms which are both tailored to their own system configuration and customer needs, and are just, reasonable and non-discriminatory, is the "best way to encourage entry into the video marketplace through an open video system."[14/] This is particularly true if the Commission seeks to encourage local exchange carriers other than the incumbent LEC to construct video distribution infrastructure and offer competition in the video marketplace on high capacity fiber optic networks such as those operated by MFS.

The legislative history of the 1996 Act supports this position. The Joint Explanatory Statement explains that "[t]here are several reasons for streamlining the regulatory obligations of such systems," including the fact that even dominant local exchange carriers deploying OVS will be "new entrants" in the established video programming market and, therefore, deserve reduced regulation in order to level the playing field.[15/] The Congress also noted that "the development of

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[12/] *NPRM* at ¶ 41; *see also* 47 U.S.C. § 573(a) (1996 Act at § 653(a)).

[13/] *NPRM* at ¶ 31.

[14/] *Id.* at ¶ 30.

[15/] *Conference Report* at p. 178. This is particularly true with respect to non-dominant local telephone companies who are "new entrants," and do not have any market dominance, in either the (continued...)

competition and the operation of market forces mean that government oversight and regulation can and should be reduced."[16] Clearly, in determining that telephone companies offering OVS are "new entrants" in the video marketplace who will compete with established cable television incumbents and should therefore be subject to streamlined entry and rate regulation, the Congress echoed reasoning long applied by the Commission to new entrants in the long distance and local telephone markets. Indeed, as the Commission notes, even though the 1996 Act specifically excludes OVS from Title II regulation, it nevertheless applies essentially the same "just and reasonable" standard used in Title II to the carriage and rate obligations of OVS operators[17] and essentially has declared, by requiring streamlined regulation for these new entrants to the video distribution marketplace, that they are "non-dominant."

MFS submits that, to determine how appropriately to implement the 1996 Act's "just and reasonable" and "not unjustly or unreasonably discriminatory" standards for OVS, the Commission should look to its parallel application of those same standards in the *Competitive Carrier* line of

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[15] (...continued)
cable television or the telephone markets and who, moreover, do not have existing cable or telephone ratepayer-financed networks. Such new carriers will need to compete head-to-head with both incumbent cable operators and local exchange carriers, many, if not all, of whom will likely offer full video and telephone services to their *existing* subscribers. In comparison, new entrants will have to expend huge capital resources to construct networks and, at the same time, will have to market their services in such a way that they will provide innovative, competitively-priced, choices for subscribers and, in the case of OVS, customer programmers. Clearly, the "market incentives and the need to compete," *NPRM* at ¶ 1, which the Commission has already tentatively concluded exist and will assure just and reasonable negotiated rates charged by OVS operators who must compete with an incumbent cable operator, are an even larger factor for new entrants who must compete with incumbents on both sides of the converging industry.

[16] *Id.*

[17] *NPRM* at ¶ 30.

decisions.[18] In those cases, the Commission determined, among other things, to forbear from regulating rates of non-dominant carriers, applying instead a presumption of lawfulness to their rates. Importantly, the Commission did not merely determine to forbear from requiring tariffs to be filed by non-dominant carriers, it also wisely did not try to develop rigid guidelines, formulas or standards for determining whether rates are just and reasonable, nor did it require that non-dominant carriers make their contracts public -- all of which would have had the same effect as tariffs in "stifl[ing] price competition and service and marketing innovation,"[19] and providing "a potential vehicle for collusive conduct and facilitating price discounting."[20] Instead, it relied upon the principle that "[c]ompetitive market forces, together with our power to intervene in appropriate cases, are sufficient checks" on the rates of non-dominant carriers.[21]

To have tried to develop formulas and standards for determining what would constitute an unjust or unreasonable rate, term or condition in those early *Competitive Carrier* decisions (the first

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[18] Policy and Rules Concerning Rates of Competitive Common Carrier Services and Facilities Authorizations Therefor (CC Docket No. 79-252) ("Competitive Carrier Proceedings"), *First Report and Order*, 85 F.C.C.2d 1 (1980) ("First Report"); *Second Report and Order*, 91 FCC 2d 59 (1982) ("Second Report"), *recon.*, 93 F.C.C.2d 54 (1983) ("Recon Order"); *Third Report and Order*, 48 Fed. Reg. 46,791 (1983); *Fourth Report and Order*, 95 F.C.C.2d 554 (1983) ("Fourth Report"), *vacated*, *AT&T v. F.C.C.*, 978 F.2d 727 (D.C. Cir 1992), *rehearing en banc denied*, January 21, 1993; *Fifth Report and Order*, 98 F.C.C.2d 1191 (1984), *recon.*, 59 Rad. Reg. 2d (P&F)543 (1985); *Sixth Report and Order*, 99 F.C.C.2d 1020 (1985), rev'd, *MCI Telecommunications Corp. v. F.C.C.*, 765 F.2d 1186 (D.C. Cir. 1985).

[19] Second Report at ¶ 24.

[20] Fourth Report at 556, n. 3.

[21] Second Report at ¶ 24; *see also* Fourth Report at ¶ 38 ("[t]he combination of our ability to investigate rates of non-dominant carriers in response to complaints or on our own initiative and market forces will ensure that these carriers' rates are just and reasonable.")

of which was as far back as 1980), would unquestionably have circumscribed and hamstrung the ability of new entrants to develop innovative service offerings and therefore hampered the exponential growth of the long distance marketplace. The absence of formulas and tests for what constitutes "just and reasonable" did not result in multitudes of valid complaints,[22] but instead facilitated the growth of a market where, in only a few short years, the the monopoly carrier's market share was eroded by more than a third, and hundreds (if not thousands) of carriers now engage in vigorous competition at all levels and in a multitude of geographic and service market niches. Thus, as the Commission predicted in making its decision to forbear from intrusive rate regulation, valid complaints were indeed infrequent, and competitive growth substantial, thus demonstrating the correctness of the Commission's market analysis.[23]

The Commission should exercise the same judgment in the OVS market, particularly where, unlike those earlier *Competitive Carrier* decisions, the Congress has now clearly indicated its intent for a streamlined, deregulated approach and has given the Commission the statutory tools to implement that approach. To construct specific rules and regulations regarding rates, terms, and conditions which will be appropriate for all of the contractual arrangements which might be developed by OVS operators is an impossible task. Any attempt to do so, especially in the case of non-dominant carriers, would necessarily circumscribe the development of new products and services, and consequently would have precisely the result which the Commission, and now the

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[22] Had complaints proved frequent, demonstrating that the competitive marketplace was not working as the Commission had expected, the Commission could have exercised its reserved ability to re-regulate the services -- which of course it never did. *Id.* at ¶ 22.

[23] *Id.* at ¶ 23 ("If our analysis of the market is correct, valid complaints should be infrequent").

Congress, have sought to avoid -- marketplace development dictated by the predictions of regulators, and not driven by the market itself. Instead, therefore, the Commission should permit "[m]arket forces, together with [its] power to intervene in appropriate cases,"[24/] either on its own motion (should it believe that the market in general is not working as expected) or in response to specific complaints, to be the principle under which the Commission permits the market to develop.

Under this principle, approaches such as those described in Paragraph 31 of the *Notice*, which attempt to apply standards and formulas for deciding, in advance, whether a particular rate or charge for carriage is just and reasonable, would clearly be inappropriate. All of those approaches would necessitate predictions of the rate structures, platform designs, and marketplace penetration which will develop in the OVS market. Clearly, by doing so, and developing rules based on those predictions, the Commission would be stifling the very market innovations and infrastructure development that the Congress sought in mandating flexible market entry and streamlined regulation.

Similarly, the Commission has long recognized that published rates "stifle price competition and service and marketing innovation."[25/] This is the case whether the rates are published in a tariff or in a public contract. While the Commission's *Notice* tentatively concluded that OVS contracts should be made public, MFS urges that it once again refer to the successful development of the long distance marketplace under the Commission's forbearance decisions. There, a robust resale market developed because non-tariffed facilities-based carriers had every incentive to maximize their

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[24/] Second Report at ¶ 24.

[25/] *Id.* at ¶ 24.

network usage by permitting their competitors to resell their services. That vigorous competition emerged without public contracts precisely as the Commission's *Competitive Carrier* decisions predicted -- based on marketplace factors -- without the detriment of published rates. There, the results amply justified the Commission's reliance on the market, plus its complaint jurisdiction, to assure that negotiated carrier-to-carrier contracts would be just and reasonable, and not unjustly or unreasonably discriminatory.

There is no basis for an assumption that the marketplace will not be equally effective in the OVS context. OVS operators will certainly have the same incentives as facilities-based long distance carriers to maximize the use of their networks by developing rates which encourage programmers to purchase service.[26/] As the Commission found in the long distance context and more recently in its regulation of Commercial Mobile Radio Services carriers, that incentive for competition and service innovation clearly outweighs any possible benefit from the published rates. For an OVS provider to have to signal its price structure to its competitors -- both other OVS providers and the incumbent cable operator -- clearly would be contrary to the Commission's (and Congress') goal of encouraging vigorous competition in the video market.

[26/] MFS also notes that the goal of enabling enforcement of non-discrimination obligations could easily be circumvented by an OVS provider who offers programming directly to subscribers over the platform. If contracts are required to be made public, it might actually give OVS operators who offer their own programming a competitive advantage, since they will have no contracts to make public.

IV. THE 1996 ACT REQUIRES ONLY THAT THE COMMISSION ASSURE THAT OVS OPERATOR CERTIFICATIONS ARE FACIALLY PROPER

The 1996 Act requires that an OVS operator submit a certificate to the Commission which certifies that it complies with the Commission's OVS regulations, adopted pursuant to 47 U.S.C. § 573(b). The Act further requires that the Commission publish notice of such certifications and act upon them within ten days of filing. MFS agrees with the Commission that the 10-day period permitted for review is a clear indication that the Congress expects that the Commission review will be to determine whether a certification contains the necessary attestation of compliance with the rules.[27/] The language of the statute itself supports this conclusion by requiring that the OVS operator certify to the Commission that it will comply with the applicable regulations, rather than requiring that the Commission certify compliance.[28/] Furthermore, the legislative history also indicates that entry regulation of OVS operators be limited to self-certification. For example, the House proposal would have required only that a common carrier notify the Commission of its intent to offer video programming,[29/] and the Conference Report indicates that the provision was expanded only slightly in conference, by adding that reduced regulation afforded to OVS operators would only apply subject to "Commission certification of a *carrier's intent to comply*."[30/]

The requirement for submission of such certificates, and the Commission's processing of them, however, does not indicate that the Congress intended to establish an entry hurdle for OVS

27/ *NPRM* at ¶ 68.

28/ 47 U.S.C. § 653(a)(1).

29/ H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 175 (1996).

30/ Conference Report at 177 (emphasis added).

operators, particularly in the case of non-dominant carriers who, even prior to the 1996 Act, were not required to obtain Section 214 authority to construct telecommunications facilities -- just the opposite. The Act clearly omitted the entry scrutiny that was faced by dominant VDT providers before the Commission the Section 214 requirement for those carriers, thereby recognizing that such carriers are non-dominant in the video market and essentially treating them the same way that non-dominant telephone companies have long been regulated.

Moreover, in leaving the Commission ten days to review a Certificate of Compliance, the Congress certainly couldn't have intended that the Commission would be required to give any "stamp of approval" to the OVS plans of the submitting carrier. Indeed, the Congress again parallels the Commission's earlier *Competitive Carrier* decisions in its desire to take away entry hurdles and leave regulation to the marketplace and, where necessary, the Commission's complaint jurisdiction. In the second of those decisions, the Commission reasoned:

> In view of the present competitive industry structure, we believe that the Commission need not exercise its certification authority in such a manner as to ensure the financial soundness or credibility of new resale carriers. Rather, we believe that competitive market forces will serve effectively to weed out inferior operations. To repeat, successful market inroads can and should depend, to a large extent, on carrier conduct and performance, not upon the Commission's unintended "stamp of approval." If free from artificial entry constraints, new market entrants will be able to compete through pricing and marketing strategies, service quality, innovation and carrier willingness to respond adequately to individual customer demands. In turn, the unencumbered introduction of new and varied resale services is likely to result in a broad array of service alternatives significantly benefitting the telecommunications user. In sum, we find that economic regulation in the form of entry and exit controls serves no public policy that will not be better served by competitive market forces.[31/]

[31/] Second Report at ¶ 28.

The Commission should not attempt a substantive review of an OVS operator's proposal in order to pass upon the merits of the operator's compliance with the rules. Indeed, to do so would be to turn the new OVS procedure into a reconstituted Section 214 proceeding under another name. First of all, the Commission should not -- indeed may not -- suspend the 10-day approval period in order to investigate any objection. Second, it is unclear how or why any party would have ground to challenge an OVS operator's Certificate that it is in compliance with the rules until the system is available. At that time, if any party believes that the system does not comply with any rule, it may seek Commission review pursuant to Section 653(a)(2) of the Act.

In this regard, MFS also urges that the Commission take measures to assure that no party may take advantage of the process by filing frivolous complaints. As in the *Competitive Carrier* context, the Commission must be ever "mindful of the potential for the frivolous or strategic use of the complaint process. If [the Commission's] analysis of the market is correct, valid complaints should be infrequent."[32/] Accordingly, the Commission should be prepared to take strong action when any such frivolous complaint is filed, including, but not limited to, imposing sanctions against the complainant. This will ensure that the Commission, OVS operators and, perhaps most importantly, the competitive marketplace, is not burdened with costly proceedings based on objections designed only to delay the provision of service.

32/ Second Report at ¶ 23.